INDEX

Page

Opinion below 1

Questions presented 1

Statement of the case 2

Reasons for denying the writ 9

1. The decision below does not conflict with public policy, raises no special and important issues, in no manner threatens the future effectiveness of private antitrust actions, but merely recognizes the complete lack of merit in petitioner's case .. 9

2. Petitioner received a fair jury trial, and the denial of admission into evidence of four arbitrarily selected estimates of purported possible alternative damage figures which had no evidentiary basis in no manner conflicts with any decision of this Court 11

3. The instructions on causation properly stated the applicable standard, and do not conflict with prior decisions of this Court or those of other circuits 13

Conclusion 16

Table of Cases

Atlantic & Gulf Stevedores v. Ellerman Lines, 369 U.S. 355 (1962) 10

Beacon Theatres v. Westover, 359 U.S. 500 (1959) .. 12

Bigelow v. RKO Pictures, 327 U.S. 251 (1946) 11

Cataphote Corporation v. DeSoto Chemical Coatings, Inc., 450 F. 2d 769 (9th Cir. 1971) 14

Dahl, Inc. v. Roy Cooper Co., 448 F. 2d 17, 19 (9th Cir. 1971) 15

General Insurance Co. of America v. Hercules Construction Co., 385 F. 2d 13, 24 (8th Cir. 1967) 14

Herman Schwabe, Inc. v. United Shoe Machinery Corp., 297 F.2d 906 (2d Cir. 1962) 12

Neely v. Eby Construction Co., 386 U.S. 317 (1967).. 11

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1954) 9

South-East Coal Company v. Consolidation Coal Company, 434 F. 2d 767, 784-785 (6th Cir. 1970) 14

United Banana Company v. United Fruit Company, 172 F. Supp. 580, 587 (D. Conn. 1959) 15

United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) 15

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-458

HOSPITAL TELEVISION, INC., a Corporation,
Petitioner,

- v.

WELLS TELEVISION, INC., a Corporation, and TISHMAN REALTY & CONSTRUCTION COMPANY, INC., a Corporation,
Respondents.

RESPONDENTS' BRIEF

In Opposition to Petition for Writ of Certiorari to the United States Court of Appeals For the Eighth Circuit

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 462 F.2d 417 (1972).

QUESTIONS PRESENTED

The two questions presented for review in the Petition for Writ of Certiorari are dramatized, abstract inquiries not expressed in the terms and circumstances of the case. The issues, as stated, are not involved in this controversy. Petitioner's points should be restated as follows:

1. Whether, in this jury trial of a treble damage anti-trust case, the Trial Court properly excluded two damage exhibits offered by Petitioner which contained arbitrary percentage levels of receipts and pro forma profits based upon business which Petitioner alleged it might have taken away from defendant Wells.

2. Whether the instructions on causation and damages, read in context with the entire charge to the jury, properly stated the applicable legal standard, considering also that the evidence in support of the instruction was admitted without objection.

STATEMENT OF THE CASE

This suit took thirteen days to try. The jury, in approximately twenty minutes, returned a verdict in favor of both defendants.

The Eighth Circuit Court of Appeals in reviewing this complex record, without an appendix, unanimously affirmed the judgment, holding that there was no basis for error, and that the instructions fairly submitted all of the issues to the jury. Petitioner's statement of the case is misleading, and by virtue of its selective nature, presents an inaccurate view of the evidence and the proceedings below. It is necessary therefore to supplement Petitioner's statement.

Liability in this case was hotly contested. While the question was not reached by the Court of Appeals, Respondents argued vigorously that Petitioner failed to make a submissible case on the issues of conspiracy, effect on interstate commerce and proximate cause of damage. Petitioner also omits any reference to the controversy over the relevant market, and the fact that Respondents adduced substantial evidence to show, contrary to Petitioner's contentions, that: (1) the line of commerce was the rental of

television sets to all rental customers, including hospitals and hotels and motels; and (2) that the relevant geographic market was nationwide.

Petitioner operates primarily in St. Louis, Missouri, and rents television sets mainly to hospitals. Respondent Wells Television, Inc. ("Wells") competes in the television rental business on a national basis. It still rents sets to hotels and motels but, because of a stress in the hotel market and the competition from television manufacturers, began in about 1960 or 1961 emphasizing the rental of television sets to hospitals. Among the competitors of both Petitioner and Wells, for the hospital business in St. Louis, Missouri, are two manufacturers (RCA and Sylvania), and other independents (Evenview, Wittman and Lloyds) (T. 267, 268, 275).

Wells had contracts with less than 1 percent of the total hotels, motels and hospitals in the United States during the entire period in question. Wells share of the national market in hospitals only was 3.2% in 1960; 6.2% in 1965; and 7.4% in 1970. The Wells percentage of hospitals in its St. Louis region is 8%. Wells has only 20% of the market in short term acute care private hospitals within an 80 to 85 mile radius of St. Louis (T. 1497-1498; 1500; 1508-1511).

Plaintiff's failure to prove injury. Perhaps the most glaring deficiency in the plaintiff's case was its inability to prove the "fact of damage" or that plaintiff had suffered any injury proximately caused by any claimed violation. This case dealt with services, and under plaintiff's theories, these services were "highly personalized." Yet there was no showing that plaintiff (as distinguished from other competitors) would have obtained any of the Wells' hospital accounts—let alone how much profit plaintiff would have enjoyed.

Petitioner began business with an initial capitalization of $1,000 (T. 422). Sales increased from 1959 through

1965, at which time there was a dip in earnings due to the loss of an account to a competitor of Wells. From 1968 through the date of trial, Petitioner's sales continued to increase, and in 1970 its sales amounted to $92,292.00. Mrs. Dennis, Petitioner's sole stockholder, enjoyed a good income and other tax benefits from Petitioner and her affiliated companies.

Some of the contracts of Wells with its hospital customers contained clauses discouraging or preventing patients or other users from bringing private sets into the hospitals, and allowing Wells an opportunity to match a better bid from any other supplier that such hospitals might receive near the expiration of the current contract terms. There was absolutely no evidence that the "right to match" clause was ever invoked. Most of the hospitals held independent policies against the use of private sets by patients because of such factors as potential liability, volume control, and damage to the master antenna system or interference with reception. The private set clause made it easier for the hospitals to enforce their already existing policies (T. 6-7, 65, 87, 627, 1273).

Other contract clauses, relating to such matters as automatic renewal and exclusive dealing, were substantially identical to clauses in Petitioner's contracts, and Mrs. Dennis testified that these were reasonable means to protect an investment. The Wells' contract provided for its retention of title to the master antenna systems which it installed and maintained at some hospitals. The clause was never invoked, and no system has ever been removed (T. 346-347, 624).

The evidence demonstrated that television service to patients provides only a small portion of a hospital's income, and that the hospital administrators want a service that provides the required manpower and efficiency without the expenditure of its own resources. The

hospital administrators tend to retain the television supplier they have hired unless service is unsatisfactory. One way to measure service is by the number of complaints lodged by the patients. In the case of Wells, complaints were rare; the administrators were pleased with the Wells service, and have generally not sought out bids at the expiration of a contract (T. 69, 1274, 1350, 1364, 1373, 1395-1396).

Wells advertises extensively, has its own engineering department for research and development, has introduced various improved equipment into the market not offered by its competitors, and has performed extra services beyond its contractual obligations (T. 1455, 1469, 1475, 1478-1481). Since 1959, Petitioner has never won in any competitive bidding situation with any competitor (T. 403).

Respondents elicited testimony, over several days, from virtually every hospital administrator in the St. Louis metropolitan area to the effect that one reason they continued to do business with Wells was satisfaction with its superior service. Petitioner never once objected to the introduction of such testimony. In fact, the first two witnesses offered by Petitioner attested to the superior service of Wells.

Mrs. Dennis, who owned all of the stock of Petitioner, has done most of the selling for Petitioner. She admitted that she devoted only 15% of her working time to Petitioner, operating from one room and the basement of her home. Most of the hospital administrators could not recall solicitation of business by Petitioner. There was contradictory testimony by Mrs. Dennis, from which the jury could have justifiably concluded that her company engaged in no personal solicitation of hospital accounts between 1959 and 1965. There were infrequent, if any, solicitations by Petitioner of any hospitals from 1965

through the time of trial. Petitioner was not even listed in the yellow pages of the telephone book (T. 255-258, 307, 345, 406-409).

In 1964, Petitioner, not revealing that it was a television supplier, conducted a purported independent survey of hospitals for the undisclosed purpose of obtaining information about the contracts of the hospitals with Petitioner's competitors. Of all the hospitals surveyed, only one expressed dissatisfaction, and this hospital was not one being served by Wells. With the knowledge that all of the Wells customers were satisfied, Mrs. Dennis nevertheless wrote a letter to all of the hospitals serviced by Wells, indicating that Petitioner had been "favored with a stroke of good fortune" to receive the results of a confidential survey. The letter noted that the survey revealed one hospital was dissatisfied with its television supplier, and suggested that if the hospital to whom the letter was addressed was the one, Petitioner would like to discuss its services (T. 276, 282-284, 288-290).

The record discloses that when Mrs. Dennis wrote these letters to the hospitals serviced by Wells, she knew these statements were false, and that the hospitals were satisfied with the Wells service (T. 291).

The damage exhibits. Petitioner offered into evidence two charts relating to claimed monetary damages (Pl's. Exs. 321 and 321(a)). One chart covered a period beyond the applicable four-year statute of limitations, and both charts related to some hospitals that were not even included in the amended complaint.

Stating that it was impossible to determine which hospitals Petitioners might have obtained as customers from Wells, the accountant who prepared these charts acknowledged that he was arbitrarily directed by Petitioner's counsel to select 25%, 50%, 75% and 100% as the hypothetical and alternative percentage levels of the business

of Wells which Petitioner claimed it might have obtained (T. 847, 952).

The accountant admitted the conjectural nature of the estimates which served as a basis for his calculation of dollar amounts attributed to each of the four arbitrary percentages. He did not use actual cost figures on most of the Wells contracts in evidence, and made estimates of such factors as the actual number of Wells television sets in use rather than utilizing the actual figures in evidence (T. 853-859).

Prior to excluding the charts from jury consideration, the trial judge questioned Petitioner's counsel in regard to the exhibits. Petitioner's counsel acknowledged on the record that he had found no case precedent for admitting into evidence an exhibit that arbitrarily sets forth four percentage figures, that no feasible basis existed for claiming that Petitioner would have obtained one of the four selected percentages of the Wells' business, and that Petitioner might just as well have used any other percentage figures in its charts (T. 967-968).

The instructions on causation. Petitioner has omitted significant portions of the charge to the jury, including instructions relevant to its complaint about "the" proximate cause. The Trial Court defined proximate cause in a manner consistent with Petitioner's present contentions.

In the detailed charge which the Court of Appeals found to be fair, the Trial Court included the following instructions, given without any objection from Petitioner:

> "A person who acquires monopoly power through normal growth and development, as a consequence of having a superior product, or business acumen, or through historical accident, is not guilty of monopolization as defined in this charge (T. 1611).
>
> • • • • • • •

An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case that the act or omission played **a substantial** part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission (Emphasis added, T. 1618-1619).

* * * * * * *

The position of the defendant Wells is: . . .

Three. That the plaintiff has suffered no damage as a direct result of a violation, if any, of the Anti-trust Laws; specifically . . . that plaintiff did not obtain the business of the customers because of its own lack of business efforts, . . . refusal to furnish the kinds of equipment necessary to sell the customers, lack of salesmanship, and attempts to pressure customers; . . . that in situations where customers of plaintiff, Wells, or other competitors, have renewed contracts without competitive bidding, such renewals have resulted from the fact that the customer is pleased with the service it has obtained and does not wish to change the service by obtaining another supplier; or because the customer has agreed to renew for other reasons, such as the addition of new or improved equipment'' (T. 1622-1624).

REASONS FOR DENYING THE WRIT

1. The Decision Below Does Not Conflict With Public Policy, Raises No Special and Important Issues, in No Manner Threatens the Future Effectiveness of Private Antitrust Actions, But Merely Recognizes the Complete Lack of Merit in Petitioner's Case.

Despite Petitioner's present assertions to the contrary, neither its appeal to the Eighth Circuit nor its present Petition to this Court raise special and important issues within the contemplation of U. S. Supreme Court Rule 19.

Petitioner's assignment of errors on appeal relate, on their face, to routine questions of admissibility of evidence and unsupportable challenges to the proximate cause and damage instruction. The true thrust of Petitioner's arguments have been even less substantial.

In essence, Petitioner has argued, and continues to argue, simply that the jury's verdict was wrong. Petitioner asserts (at page 10 of the Petition) that "proof of violation of the antitrust laws is overwhelming" so "the jury must and should have found that the violation caused injury" to Petitioner. We submit that proof of violation and injury was totally absent, and the jury's prompt resolution of the complex issues presented by plaintiff is the best evidence of that fact.

This Court has announced that it does not sit to satisfy a scholarly interest even in solid issues of substance for the sole benefit of the particular litigants involved. **Rice v. Sioux City Memorial Park Cemetery**, 349 U.S. 70 (1954). Only where there is an important principle in issue that the public interest requires to be settled, or where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal, does this Court intervene.

Petitioner attempts to fabricate a conflict and to magnify the importance of issues which are certainly not significant or special. Petitioner has failed to demonstrate that the Eighth Circuit has sanctioned a departure by the Trial Court from the accepted and usual course of judicial proceedings. There was no departure, and Petitioner received a fair and impartial jury trial.

Petitioner now argues that the court below paid insufficient heed to the difficulty of proving damages in private antitrust litigation. Yet, the jury was specifically instructed that "the circumstance that the precise amount of plaintiff's damage may be difficult to ascertain should not affect plaintiff's recovery, particularly if the defendants' wrongdoings have caused the difficulty in determining the precise amount." Appropriate recognition of this difficulty of proof cannot be transformed into the right to introduce admittedly speculative and arbitrary estimates of alleged possible damages that have no evidentiary basis. The unfounded "guesswork" exhibits were so obviously inadmissible for routine evidentiary reasons that it is inconceivable that any special or important damage question is involved.

In any event, the jury found in favor of Respondents, and the damage question need not even have been considered.

Petitioner's position turns upon the unwarranted speculation that the finder of fact must have ignored the above instruction, and rendered a verdict for Respondents on the liability issue, only because the jury did not want to bother with the task of calculating damages. However, no court is empowered to re-determine facts found by a jury, nor to search for one possible view of a case which will make a jury's findings inconsistent or contrary to the instructions. **Atlantic & Gulf Stevedores v. Ellerman Lines**, 369 U.S. 355 (1962).

Contrary to the assertion (at page 10 of the Petition) that "it is time for this court to clarify the law with respect to evidence of estimated damages in antitrust actions," this Court has long ago enunciated the damage standard to be applied in private antitrust cases. **Bigelow v. RKO Pictures**, 327 U.S. 251 (1946). That decision was applied here and was the basis of the instruction given by the Trial Court. Petitioner, inconsistent with its above-referred-to statement, has even acknowledged in its Petition (at page 12) that this Court has established a damage standard.

This case presents no issue of public concern that needs resolution, nor are any of the rulings below contrary to any accepted damage standard. The trial court simply excluded evidence that had no acceptable basis for admission.

2. **Petitioner Received a Fair Jury Trial, and the Denial of Admission Into Evidence of Four Arbitrarily Selected Estimates of Purported Possible Alternative Damage Figures Which Had No Evidentiary Basis in No Manner Conflicts With Any Decision of This Court.**

Through a curious reasoning process, Petitioner has expressed lack of faith in the jury, arguing, on the one hand, that the verdict is contrary to the overwhelming weight of the evidence, and, on the other, that Petitioner was denied a right to a full jury trial. The latter argument, premised upon the wrongful assumption that the damage charts were admissible, was not presented either to the Trial Court or the Court of Appeals, and is therefore not an appropriate consideration for this Court. **Neely v. Eby Construction Co.**, 386 U.S. 317 (1967).

Petitioner's attempt to equate the exclusion of two highly speculative damage exhibits from jury consideration with the complete denial of trial by jury of all the

factual issues as was condemned in **Beacon Theatres v. Westover**, 359 U.S. 500 (1959), can hardly be a serious effort. Indeed, Petitioner was defeated by the jury system itself.

No Trial Court ruling or instruction on any evidentiary or damage question conflicts with any pronouncement of this Court. There is no "right to jury trial" issue involved here, but merely a routine question of inadmissibility of speculative evidence.

In response to the Petition filed in this Court, it would be inappropriate to argue the merits of the case, and to detail at length the numerous reasons why the "damage exhibits" and related testimony were properly excluded from jury consideration. Suffice it to say that the damage exhibits were an attempt to convey to the jury that Petitioner had suffered a precise mathematical loss at one of the four arbitrary levels, starting with an absolute minimum of $71,152, when no damage at all had actually been proved. In **Herman Schwabe Inc. v. United Shoe Machinery Corp.**, 297 F.2d 906 (2d Cir. 1962), the court found damage exhibits were properly excluded because "the leap required to derive any rational conclusion from the expert's data was too great to allow a jury to take." The failure to offer a reasonable estimate of damage was due to the dearth of evidence underlying the projections made in the exhibits.

The jury had the available means for finding damages, if any. Sales figures of Respondent Wells and Petitioner's gross and net revenue figures were in evidence. Petitioner's accountant was permitted to testify as to the Wells' rates of return as applied to its revenues, and the actual rates of return of Petitioner were in evidence. Certainly, there was no deprivation of the right to jury trial.

Under the instructions, the jury could have found for Petitioner, and yet have found damages that Petitioner

would deem inadequate. It did not. The jury found for the Respondents because of the total absence of proof on the issues of liability and injury.

3. The Instructions on Causation Properly Stated the Applicable Standard, and Do Not Conflict With Prior Decisions of This Court or Those of Other Circuits.

Before both the Eighth Circuit and this Court, Petitioner has improperly isolated and taken out of context of the entire charge to the jury, the phrase "**the** proximate cause," as set forth in a portion of the causation and damage instructions. Petitioner completely omits the definition of proximate cause that was given to the jury (included herein in Respondents' Statement of the Case). In determining whether instructions correctly state the applicable law, the Court must consider them as a whole and not piece-meal or in isolation. See, **General Insurance Co. of America v. Hercules Construction Co.**, 385 F. 2d 13, 24 (8th Cir. 1967), and cases cited therein.

The jury was first instructed that Petitioner should recover if it suffered injury "as a direct result of some unlawful act by the defendants." Thereafter, the jury was told that "an injury . . . is proximately caused by an act, or a failure to act, whenever . . . the act or omission played **a substantial** part in bringing about . . . the injury . . . and that the injury was either **a** direct result or a reasonably probable consequence of the act of omission." This instruction is completely consistent with Petitioner's cases, with which we also agree.

The Trial Court's charge, read as a whole, could not conceivably have misled the jury into applying either a "sole cause" or a "more substantial cause" standard of causation. There was no misapplication of the rule announced, nor any departure from prior decisions of this Court.

Petitioner also now objects to what it refers to as the "customer satisfaction" provision of the causation and damage instruction. It is significant that Petitioner made no objection to the introduction of Respondents' substantial evidence related to customer satisfaction with the service of Wells. Yet, before the Eighth Circuit, Petitioner asserted that the "customer satisfaction" provision in the instruction interjected "monopoly begignity" as a valid defense to antitrust liability. Neither of the two Court of Appeals decisions cited by Petitioner provide any support for its misconstruction and misapplication of the facts and the law. Good faith motives and business excuses can be relevant unless there is a *per se* antitrust violation. **Cataphote Corporation v. DeSoto Chemical Coatings, Inc.**, 450 F. 2d 769 (9th Cir. 1971). But here, no *per se* antitrust violation was involved, nor was the evidence supporting the instruction in question offered to demonstrate Respondents' good faith motives as an excuse for a violation of the law.

Petitioner has confused the relevance of good faith motives on the issue of conspiracy or violation with the relevance of customer satisfaction resulting from superior service on the proximate cause and damage issue. We agree that customer satisfaction is no defense to any claimed *per se* antitrust violation. It is relevant on the issue of causation and damage.

Antitrust defendants are clearly permitted to present evidence that failure of a plaintiff to acquire more business was the result of plaintiff's own mismanagement, other economic conditions, or circumstances unrelated to improper conduct by the defendants. Existing case law allows defendants to explain and justify their positions on business success. See, e.g., **South-East Coal Company v. Consolidation Coal Company**, 434 F. 2d 767, 784-785 (6th Cir. 1970); **United Banana Company v. United Fruit**

Company, 172 F. Supp. 580, 587 (D. Conn. 1959), and cases cited therein. Growth, development and business success as a consequence of such factors as superior products, business acumen or historical accident have always been valid defenses to antitrust violation charges. **United States v. Grinnell Corp.**, 384 U.S. 563, 571 (1966).

The evidence, admitted without objection, as well as the instructions on causation and damages, properly stated the applicable law, and constituted no departure from any decision of other circuits. The following pronouncement of the Ninth Circuit in **Dahl, Inc. v. Roy Cooper Co.**, 448 F. 2d 17, 19 (9th Cir. 1971), is most appropriate in the circumstances of the present case:

> . . . [P]laintiff has no antitrust claim where its failure to obtain desired films is attributable to its own mistakes or failure to request them. . . . The only rational inference to be drawn from the record is that, as a newcomer with limited seating capacity, the Paris [plaintiff's theatre] simply could not compete effectively . . . We cannot escape the conviction that Dahl [plaintiff] really is complaining that it was not apportioned film by the distributors free from the necessity of competing for it."

CONCLUSION

There was no error below, and the Court of Appeals properly affirmed the judgment in favor of Respondents. Petitioner has not presented any reason why this Court should grant its Petition, and for the reasons stated, a writ of certiorari should be denied.

Respectfully submitted,

Walter M. Clark
WALTER M. CLARK
Fred Leicht Jr.
FRED LEICHT, JR.
ARMSTRONG, TEASDALE,
KRAMER & VAUGHAN
611 Olive Street, Suite 1950
St. Louis, Missouri 63101
Attorneys for Respondent
Wells Television, Inc.

ROBERT S. ALLEN
LEWIS, RICE, TUCKER,
ALLEN & CHUBB
611 Olive Street, Suite 1555
St. Louis, Missouri 63101
Attorneys for Respondent
Tishman Realty &
Construction Co., Inc.